Appendix F: Grey, Shenequa, L. *Passive Alcohol Sensors and the Fourth Amendment*. Published in Spring 2001 Issue of *the Impaired Driving Update*,. Civic Research Institute, Inc., Kingston, New Jersey.

Passive Alcohol Sensors and the Fourth Amendment

By Shenequa L. Grey*, published in the Spring 2001 issue of *The Impaired Driving Update,* Civic Research Institute, Inc., 4478 Route 27, P.O. Box 585, Kingston, NJ 08528

As more and more police officers across the country prepare to arm themselves with the latest technology in impaired driving enforcement, many individuals and rights advocates are questioning its constitutionality. The new device is a passive alcohol sensor that helps detect impaired drivers by testing a sample of the air surrounding them to determine the presence of alcohol.[1] Since the alcohol sensor is housed inside of a flashlight (or clipboard in the daytime), drivers are unaware that the test is being administered. If the sensor indicates the presence of alcohol, the officer will continue his investigation to determine whether the driver is impaired. Based on the officer's findings, the driver may ultimately be arrested for impaired driving.

Although the constitutionality of passive alcohol sensors has yet to be addressed by appellate courts, it is likely that the use of the sensors will be upheld if courts follow well-established constitutional principals. The following is an analysis of the constitutional questions that may arise when passive alcohol sensors are used and the relevant case law addressing those issues.

Is it a search?

The Fourth Amendment of the United States Constitution protects persons from unreasonable searches and seizures. If there is no search, then no constitutional right has been implicated. In determining whether there has been a search, courts must first

determine if a person has an expectation of privacy and, second, if that expectation is one that society is prepared to recognize as reasonable.[2] Courts must also look to whether the interest that the person seeks to protect has actually been kept private or whether that person in ordinary society could maintain the privacy he claims. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.[3]

With passive alcohol sensors, the interest a person would arguably be trying to protect is his breath. Therefore, in order for the use of the passive alcohol sensor to be a search, the individual must have an actual and reasonable expectation that his breath would be kept private. In today's society, is there such an expectation, and if so, is it reasonable?

"Plain Smell" Doctrine

It is well established that under certain circumstances police may seize evidence in plain view without a warrant.[4] The plain view doctrine "applies to 'all sensory impressions' gained by an officer who is legally present in the position from which he gains them."[5] The underlying theory of this doctrine is that there cannot truly be a reasonable expectation of privacy in something that is openly displayed to the public. Therefore, in accordance with Katz, the discovery of evidence that is subject to public perception would not be a Fourth Amendment search.

The first requirement of the plain view doctrine is that the officer must be where he has a right to be. "The doctrine serves to supplement the prior justification – whether it be . . . hot pursuit . . . or some other legitimate reason for being present unconnected with a search directed against the accused."[6] Passive alcohol sensors do not violate this first requirement as long as law enforcement was justified in making the traffic stop. Once a lawful traffic stop is made, either because of a traffic violation or a sobriety checkpoint, an officer has a right to be at the driver's side window of the vehicle.

Although the officer may be where he has a right to be, the plain view doctrine also requires that it be immediately apparent that what is before him is evidence of a crime. The smell of alcohol is quite

distinct and has historically been relied upon by officers in making the determination that the driver of a vehicle has been drinking. The smell of alcohol through a passive alcohol sensor does not change the nature of this evidence. In fact, because the passive alcohol sensor is potentially more accurate than the human nose, the police officer is even more justified in believing that the driver has been drinking than he otherwise would have been had he relied exclusively on his own nose alone.

Finally, discovery of the evidence must be inadvertent. While this theory precludes probing, an officer may aggressively use his senses. In U.S. v. Johnson,[7] the United States Court of Appeals for the Ninth Circuit rejected the defendant's argument that he had a reasonable expectation of privacy from drug agents with "inquisitive nostrils." The court found that suitcase sniffing, whether the officer is bending down or standing up, is not a search within the meaning of the Fourth Amendment. Similarly, the passive alcohol sensor enables the officer to detect the presence of alcohol by doing nothing more than what officers routinely do themselves anyway – they sniff the air around the driver. The passive alcohol sensor merely does it in a more objective and enhanced manner, with no added intrusion on the driver.

Other Sense Enhancing Devices

The United States Supreme Court and a number of United States Circuit Courts have upheld the use of sense-enhancing mechanical instruments as not being violative of the Fourth Amendment. For instance, in upholding the use of an electronic homing device, the Supreme Court held, "nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[8] In addition, the United States Court of Appeals for the Ninth Circuit has held:

> Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar

devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case.[9]

Thus, the use of technology to enhance government surveillance does not necessarily turn permissible non-intrusive observation into an impermissible search.[10] Similarly, the use of the passive alcohol sensor, which is non-intrusive and merely a mechanical instrument that enhances an officer's own sense of smell, does not constitute a search.

Sniffing Dogs

Similar to the concept of passive alcohol sensors is the use of sniffing dogs. In *United States v. Bronstein* the United States Court of Appeals for the Second Circuit upheld the use of sniffing dogs, stating, "[i]t has often been held that the use of certain 'sense-enhancing' instruments to aid in the detection of contraband, etc., does not constitute an impermissible Fourth Amendment search."[11]

In *Bronstein*, the court quickly disposed of the fact that it was a dog, not the officer, who perceived the plain smell, and that a dog's sense of smell is more sophisticated than a human's. The underlying principle is that the object of the intrusion is something that could be perceived by the human senses even though it is not the human nose actually detecting it, but a more sensitive nose. The passive alcohol sensor is nothing more than an objective and enhanced means of doing what officers have always done in the detection of alcohol. The passive alcohol sensor simply enables them to do it in a much more efficient and reliable manner.

Although sniffing dogs may be reliable, questions have been raised about the level of intrusiveness and intimidation inherent in a dog sniffing a human.[12] These questions simply do not arise with the use of passive alcohol sensors. The passive alcohol sensor is neither intrusive nor invasive. Furthermore, drivers are not intimidated by the device because they are unaware it is taking place. Therefore, the passive alcohol sensor should be upheld as merely an enhancement of the human sense of smell that effectively detects the presence of alcohol.

Appearance / Demeanor

Does a person have a right to protect personal physical characteristics or mannerisms from official scrutiny?[13] A person's breath is not unlike one's facial features, voice, handwriting or even fingerprints – they are all openly displayed to the public with no reasonable expectation that they would remain private. In finding that there was no reasonable expectation of privacy in one's voice or face, the United States Supreme Court in *United States v. Dionisio* held:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the specific content of the conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.[14]

Similarly, a person could not reasonably expect that his breath would remain private. It is constantly exposed to the public. While a person must breathe in order to live, he is not compelled to position himself in the near presence of others or to drive on a public road where he might be stopped for a traffic infraction or sobriety checkpoint. Furthermore, when a person does expose himself to the public, he also exposes himself to the government. The court in *Dionisio* addressed this point, stating:

> Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, . . . the underlying identifying characteristics – the constant factor throughout both public and private communications – are open for all to see or hear. There is no basis for constructing a wall of privacy [that] does not exist in casual contacts

> with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars.[15]

Following the logic of *Dionisio,* taking a sample of a person's breath is not a search within the meaning of the Fourth Amendment. There can be no reasonable expectation of privacy in one's breath. It is repeatedly exposed to the public and its exposure cannot realistically be limited. The government cannot be any more limited in accessing one's breath than any stranger on the street would be.

If it is a search, is it reasonable?

The Fourth Amendment of the United States Constitution does not prohibit all searches; rather, it prohibits unreasonable searches. In determining whether a search is reasonable, the courts apply a balancing test. The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment protections against the government's promotion of a legitimate governmental interest.[16]

The interest promoted by the government's use of passive alcohol sensors is to deter and apprehend drivers who are impaired by alcohol. Studies show that over 39% of all traffic fatalities are alcohol-related and that each year, more than 300,000 people are either killed or injured in alcohol related crashes – an average of one every two minutes.[17] According to a National Highway Traffic Safety Administration (NHTSA) study, one of the problems in DWI enforcement is that many impaired drivers go either undetected or unpunished.[18]

The government has a compelling interest in reducing the amount of impaired drivers and in saving thousands of lives that are lost as a result of these crashes. The passive alcohol sensor enables officers to identify many of those drivers who might have otherwise gone undetected. Detecting impaired drivers could ultimately reduce the number of highway crashes as well as deaths. This compelling governmental interest significantly outweighs any minimal intrusion on an individual's privacy rights when a passive alcohol sensor is used.

Use of a passive alcohol sensor does not require participation by the driver. The driver does not have to leave the vehicle nor ordered to blow or take a deep breath. In fact, the driver does not have to do anything that he would not have had to do if the sensor were not being used. Furthermore, since the officer can quickly make a determination from the air surrounding the driver, the driver may be readily allowed to continue on his way if there is no alcohol detected. Such a stop would be no more time-consuming than a stop where no passive alcohol sensor is used. Since the government has a compelling state interest in detecting impaired drivers and this interest significantly outweighs the intrusion on the driver, the passive alcohol sensor is reasonable and should be upheld as a constitutional means of detecting the presence of alcohol even if it is determined to be a search within the meaning of the Fourth Amendment.

The use of passive alcohol sensors can be an effective tool in the fight against impaired driving. Because our breath is constantly exposed to the public, detecting the presence of alcohol through the use of a passive alcohol sensor does not amount to a search. Even if these sensors are deemed to constitute a search, the intrusion is minimal, and thus reasonable. Under either analysis, the use of passive alcohol sensors is a constitutionally permissible means of detecting the presence of alcohol, and their use will likely be upheld should the courts follow well-established case law addressing similar Fourth Amendment issues.

** Shenequa L. Grey serves a Staff Attorney with the National Traffic Law Center (NTLC). The NTLC is a program of the American Prosecutors Research Institute, the nonprofit affiliate of the National District Attorneys Association.*

[1] See P.A.S.TM III (“Sniffer”), www.sniffalcohol.com.

[2] *Katz v. United States*, 389 U.S. 347, 361 (1967).

[3] *Id.* at 351.

[4] *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

[5] *U.S. v. Fuentes*, 379 F.Supp. 1145, 1153 (Tex. 1974) (emphasis added). See also United States v. Leazar, 460 F.2d 982 (9th Cir. 1972); United States v. Perry, 339 F.Supp. 209 (D.C. 1972).

[6] *Id.* at 466.

[7] 497 F.2d 397 (9th Cir. 1974).

[8i] *United States v. Knotts*, 460 U.S. 276, 282 (1983).

[9] *United States v. Dubrovsky*, 581 F.2d 208, 211 (9th Cir, 1978).

[10] *Id. See also Dow Chemical v. United States*, 476 U.S. 227 (1986).

[11] *United States v. Bronstein*, 521 F.2d 459, 462-63 (2d Cir. 1975); see also United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973) (use of binoculars); Doe v. Renfrow, 451 U.S. 1022 (1981) (use of drug sniffing dogs in a school-wide search of students and their belongings).

[12] *See Doe v. Renfrow*, 451 U.S. 1022 (1981) (Brennen, J., dissenting).

[13] *See United States v. Dionisio*, 410 U.S. 1 (1973). *See also United States. v. Mara*, 410 U.S. 19, 21 (1972); *Davis v. Mississippi*, 394 U.S. 721 (1969).

[14] *Id.* at 14.

[15] *Id., citing United States v. Doe*, 457 F.2d 895, 898-99 (1972).

[16] *Delaware v. Prouse*, 440 U.S. 648, 654; (1979). *See also United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

[17] U.S. Department of Transportation, National Highway Traffic Safety Administration, Traffic Safety Facts 1999: Alcohol

[18] Jones, et al., Highway Traffic Safety Administration U.S. Department of Transportation, Problems and Solutions in DWI Enforcement Systems, (January 1998)

American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510, Alexandria, VA 22314